Supreme Court, U. S.
FILED
JUN 18 1999
CLERK

(2)

No. 98-1876

In The

Supreme Court of the United States

SONDRA SHEREN,

Petitioner,

v.

DAYTON HUDSON CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT REQUIRED BY RULE 29.6

Dayton Hudson Corporation has no parent Company and no non-wholly owned subsidiaries.

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OPPOSITION TO PETITION FOR CERTIORARI

This is a simple case involving the straightforward application of summary judgment standards under the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"). On April 12, 1996, Petitioner Sondra Sheren ("Sheren") filed a complaint in the United States District Court for the Northern District of Illinois alleging, *inter alia*, that Respondent Dayton Hudson Corporation ("Marshall Fields" or the "Company") had violated the ADA by failing to reasonably accommodate her visual impairment. At the close of discovery, Marshall Fields filed a motion for summary judgment based upon stipulated facts. Marshall Fields argued that, based on those stipulated facts, Sheren could not establish that she was a "qualified individual with a disability." The District Court granted summary judgment in favor of Marshall Fields, concluding that "because Sheren cannot show she could perform her job with or without a reasonable accommodation, she does not fall within the class of persons protected by the ADA" (App. 9).

On February 18, 1999, just six days after oral argument, the United States Court of Appeals for the Seventh Circuit (in a two-page unpublished opinion) summarily and unanimously affirmed the District Court's decision "substantially for the reasons given by the district judge" (App. 2). Sheren did not seek any rehearing in the Seventh Circuit.

Sheren seeks this Court's review of the Seventh Circuit's decision on two grounds. First, Sheren contends that the Seventh Circuit concluded that one of her proposed accommodations – the installation of a stationary

magnification machine[1] – was unreasonable based on a misallocation of the burden of proof (Pet. at 5-6). This contention is meritless. The Seventh Circuit's decision did not turn on the allocation of the burden of proof. Instead, the Seventh Circuit's decision turned on the evaluation of all of the stipulated record evidence regarding Sheren's proposed accommodation which, as a matter of law, established that the accommodation was not reasonable because it was not effective. Specifically, both the District Court and the Seventh Circuit held that Sheren's proposed accommodation was "unreasonable or ineffective" because it would not enable Sheren to perform the essential functions of her job (App. 7-8). This conclusion is not altered by the placement of any burden of proof. Furthermore, all of the ADA cases cited by Sheren (Pet. at 5-6) agree that a plaintiff has the burden of proving that an accommodation is effective and would enable her to perform the essential functions of the job. Accordingly, there is no dispute among the Circuits regarding this issue.

Second, Sheren contends that the District Court improperly resolved factual issues on summary judgment (Pet. at 6-7). At most, Sheren alleges that the District Court misapplied a properly stated rule of law – an issue over which this Court will "rarely" grant certiorari. *See S. Ct. R. 10.* Moreover, Sheren is wrong. The stipulated facts established that Sheren was unable to perform her

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[1] Although Sheren also mentions the accommodation of keeping the store aisles clear (Pet. at 4), because she did not raise that matter before the Seventh Circuit, she is barred from raising it before this Court.

job without reasonable accommodation, and Sheren presented no "objective evidence" (Pet. at 6) to the contrary. Accordingly, Sheren presents no issue justifying this Court's review.

COUNTER STATEMENT OF THE CASE

Sheren's statement of the case conspicuously ignores several facts – all of which were stipulated – that were critical to the District Court's and Seventh Circuit's decisions.

In June 1991, Marshall Fields hired Sheren to work as a furniture sales associate at its State Street store in Chicago, Illinois. Sheren was responsible for helping customers select room plans, color schemes, furniture, fabric samples, and accessories located on the eighth, ninth and other floors. Sheren's job required that she read retail tickets, catalogues, brochures, and computer screens and distinguish fine differences in the appearance of furniture and fabrics.

From 1991 through 1995, Sheren's vision deteriorated to the point where she was legally blind in one eye and could perceive only larger shapes with the other eye. Sheren's visual condition is permanent, uncorrectable, and degenerative. Sheren believed that her visual impairment was beginning to affect her job performance. In August 1995, after experiencing various problems with performing her duties, Sheren advised her supervisor that her "eyes had deteriorated and that [she didn't] know if [she] could continue without some kind of assistance." Sheren also told Marshall Fields' Assistant

Human Resources Manager that due to her "vision" she "didn't know if [she] could continue in [her] job."

Sheren's personal physician confirmed her belief in two August 1995 written statements to Marshall Fields. In the first, he advised Marshall Fields that Sheren "has significant problems with color differentiation, depth perception, and reading. Has difficulty with ambulation because of decrease in vision and vertigo." In the second note, which is ignored by Sheren in her petition,[2] he stated unequivocally that Sheren is "unable to continue in current position – will need to find new position taking in consideration her visual disabilities."

Marshall Fields did seek other positions for Sheren. However, none were available within the geographical restrictions imposed by Sheren (*i.e.*, she was willing to consider only certain stores) and which she could perform with or without reasonable accommodation. As a result, in September 1995, Marshall Fields placed Sheren on a short-term leave of absence while it continued seeking open positions for her. Unable to identify any available position Sheren could perform, Marshall Fields placed her on long-term disability until she retired in September 1996.

Before the District Court and the Seventh Circuit, Sheren claimed that Marshall Fields should have accommodated her by installing a stationary magnification

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[2] Sheren's failure to refer to this second note violates Supreme Court Rule 14(4), which is sufficient reason for this Court to deny the petition.

machine. The undisputed evidence regarding this proposed accommodation established: (1) Sheren's physician had advised the Company that Sheren was "unable to continue in current position;" (2) the essential functions of Sheren's job required her to accompany customers around several sales floors, each the size of a city block, providing them with information regarding and helping them to coordinate various pieces of furniture, fabric, and accessories; (3) while walking around the sales floor, customers frequently ask questions about retail tags or a fabric swatch which would require Sheren to carry the item over to the immobile magnification machine to answer; and (4) the stationary magnification machine would not enable Sheren to coordinate accessories, furniture and fabric from many floors.

REASONS FOR DENYING THE WRIT

I. Neither The District Court's Nor the Seventh Circuit's Decision Turned On Which Party Bears The Burden Of Proof Regarding Reasonable Accommodation

Sheren attempts to manufacture a legal issue where none exists. The case before the District Court and Seventh Circuit was fact intensive. Sheren claimed that a stationary magnification machine was a reasonable accommodation. Based on the stipulated factual record regarding the essential functions of Sheren's job, the nature of Sheren's visual impairment, and the ineffectiveness of her proposed accommodation, the District Court

and Seventh Circuit easily concluded that the magnification machine did not constitute a reasonable accommodation because it would not enable Sheren to perform the essential functions of her job. This fact intensive holding is ill-suited for Supreme Court review.

Furthermore, the lower courts' decisions are correct. The essence of Sheren's job at Marshall Fields was customer service. As a furniture sales associate, Sheren assisted customers with room design, color schemes, and the selection of furniture, fabric and accessories. By August 1995, Sheren's eyesight had deteriorated to the point that she could hardly see and was tripping over furniture in the showroom. Sheren claimed that installing a large, immobile magnification machine near her desk was a reasonable accommodation. To even use the stationary magnification machine, however, Sheren would have to walk to her desk on the eighth floor from anywhere on the eighth, ninth or other floors whenever a customer had a simple question about a retail tag, color scheme or fabric swatch. Moreover, the magnification machine would not enable Sheren to coordinate furniture, fabric, and accessories from different floors or, for that matter, to see where she was going as she walked around the sales floors. Accordingly, the Seventh Circuit agreed with the District Court that the proposed accommodation was "unreasonable or ineffective" (App. 7-8).

Notably, the District Court's and the Seventh Circuit's decisions did not depend on which party bore the burden of proof. After reviewing the stipulated record, the lower courts concluded that the stationary magnification machine would not enable Sheren to perform the essential functions of the job and was thus "unreasonable

or ineffective" (App. 7-8). The lower courts' decisions would be the same regardless of which party possessed the burden of proof.

II. Contrary To Sheren's Contention, There Is No Conflict Among The Circuits

Even if the burden of proof were important to the lower courts' decisions, this Court should deny Sheren's petition. All of the ADA cases cited by Sheren agree that a plaintiff bears the burden of proving that an effective accommodation exists, *i.e.*, one which would enable her to perform the essential functions of a job.[3] *See Walton v. Mental Health Ass'n*, 168 F.3d 661, 670 (3rd Cir. 1999) ("the plaintiff must show, as part of her burden of persuasion, that an effective accommodation exists that would render her otherwise qualified"); *Riel v. Electronic Data Systems Corp.*, 99 F.3d 678, 683 (5th Cir. 1996) ("reasonable accommodation is an element of a prima facie case of discrimination under the ADA . . . and [plaintiff] thus bears the burden of proof of reasonableness," *i.e.* that an accommodation "is reasonable in the run of cases"); *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775, 781 (6th Cir. 1998) ("employee must establish that a 'reasonable' accommodation is possible, and bear a traditional burden of proof that she is qualified for the

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[3] These cases only differ in their allocation of the burden of proving that an otherwise effective accommodation is cost-effective. This distinction is irrelevant to the District Court's and Seventh Circuit's decisions, however, because neither considered the cost of Sheren's proposed accommodation. In fact, no cost information was presented to either court.

position with such reasonable accommodation"); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir. 1995) (employee has burden of persuading trier of fact that he is qualified to perform the essential functions of the job with or without reasonable accommodation);[4] *Zukle v. Regents of the University of California*, 166 F.3d 1041, 1046-47 (9th Cir. 1999) (plaintiff must establish "the existence of a reasonable accommodation that would enable him or her to perform the essential functions of an available job"); *Taylor v. Food World, Inc.*, 133 F.3d 1419, 1425 (11th Cir. 1998) ("the burden is on [plaintiff] to prove the existence and reasonableness of such accommodation") (*citing Willis v. Conopco, Inc.*, 108 F.3d 282 (11th Cir. 1997)). This is also the law in the Seventh Circuit. *See Sieberns v. Wal-Mart Stores, Inc.*, 125 F.3d 1019, 1022-23 (7th Cir. 1997) ("plaintiff bears burden of proof on this issue; she must be able to show that she is a 'qualified individual with a disability' in order to successfully prosecute an ADA claim").

In Sheren's case, the Seventh Circuit concluded that, based on the stipulated facts, her proposed accommodation of a stationary magnification machine was "unreasonable or ineffective" because it would not enable Sheren to perform the most essential function of her job –

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[4] Although *Benson* suggests a burden-shifting approach to the issue of reasonable accommodation, 62 F.3d at 1112, more recent Eighth Circuit cases explain that a plaintiff bears the burden of proving that a reasonable accommodation, enabling him to perform the essential functions of his job, is possible. *See, e.g., Buckles v. First Data Resources, Inc.*, ___ F.3d ___, 1999 WL 346107 (8th Cir., June 2, 1999); *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 788 (8th Cir. 1998).

adequate customer service (App. 7-8). Under each of the ADA cases identified by Sheren, the plaintiff *at a minimum* bears the burden of proving that an effective accommodation exists. Because the undisputed evidence established that Sheren's proposed accommodation was ineffective, the Seventh Circuit correctly concluded that Sheren had not met her "burden of proof on this issue" (App. 8) under the law of the Seventh and every other Circuit.

III. The District Court Did Not Resolve Factual Issues On A Motion For Summary Judgment

Finally, Sheren argues that this Court should grant her petition for a writ of certiorari because the District Court erroneously resolved disputed questions of fact at the summary judgment stage. Besides providing an insufficient basis for this Court to grant a petition for writ of certiorari – Supreme Court Rule 10 provides "a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law" – Sheren's argument is absurd.

Sheren contends that the lower courts improperly resolved a genuine issue of material fact regarding whether Sheren was able to perform the essential functions of the furniture sales associate position *without* reasonable accommodation. The stipulated facts permit no other conclusion. In August 1995, Sheren advised her supervisor that, due to her visual impairment which created on-the-job problems and errors, she did not know if she could continue performing her job. That same month, her personal physician advised the Company that Sheren

was "unable to continue in current position." Contrary to her claim (Pet. at 6), Sheren presented no "objective evidence" that her performance was above average. Rather, Sheren claims that her supervisor's lack of knowledge of her visual impairment (apart from Sheren's conversation with him) and his belief that Sheren's performance was average or above average creates a genuine issue of material fact regarding her ability to perform the job without a reasonable accommodation. This statement is irreconcilable with the undisputed fact that Sheren and her doctor repeatedly told the Company that Sheren was unable to perform her job. The Seventh Circuit correctly concluded that Sheren's supervisor's *lack of independent knowledge* of Sheren's problems was "immaterial" (App. 6). More relevant to Sheren's petition, this entire argument is simply a fact-based argument under settled Fed. R. Civ. P. 56 standards undeserving of review by this Court.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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